“Unrichtiges Recht” in Slovakia? The Radbruch Formula and Positive Law from the Nineties

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While the Slovak Parliament might not be the most obvious place to look for a (modest) rerun of the classic legal dilemma about unjust laws, constitutional enthusiasts might want to tune in for once, as the National Council (the official name of the assembly), was in recent weeks the site of a reinvigorated effort to invalidate amnesties granted in the late 1990s by the once aspiring authoritarian Vladimír Mečiar. The government has not yet reached a consensus but the impending vote holds more promise than the previous seven attempts.

The amnesties awarded by Mečiar related to two distinct but politically connected events: an alleged abduction to Austria of the then President Michal Kováč’s son by the Slovak secret services and the interference in a referendum by Mečiar’s minister of interior.

Factual and historical background

A much abbreviated version of the story, which leaves out a number of events such as the murder of a police officer, goes as follows: after the creation of the independent Slovak Republic in 1993, Michal Kováč and Vladimír Mečiar soon emerged as political opponents in their respective roles as president and prime minister. In 1994, Michal Kováč Jr., the son of the first Slovak president, was wanted under an international arrest warrant on charges of fraud in Germany. Less than a year later, unknown perpetrators – later revealed according to various sources as secret service agents – abducted Kováč Jr. and drove him to an Austrian border town called Hainburg, where they left him intoxicated in a car in front of a police station and alerted the police. Kováč Jr. was first taken in custody but eventually a regional court in Vienna decided against his extradition to Germany and he was allowed to return to Slovakia. He would later stand trial in Bavaria anyway but the case was ultimately dismissed in 2000.

Meanwhile, a referendum on Slovak accession to NATO was called, to which president Kováč affixed a question (following a successful petition) regarding future direct election of the president in light of the looming expiry of Kováč’s presidential mandate. The government, however, ordered the minister of interior to distribute the referendum ballots without this question which contributed to the meagre turnout of 9.53% and the failure of the referendum. Soon after, in March 1998, Kováč’s term expired, making Mečiar the acting president. On his first day in that capacity, he ordered that no criminal proceedings related to the abduction and the referendum can be instituted and those ongoing shall be ceased.

Although Mečiar’s quasi-authoritarian stint at the helm of Slovakia did not last much longer, the reformist government of Mikuláš Dzurinda that took over was not able to purge his legal legacy. The Slovak Constitutional Court decided in late 1999 that it is not within the competence of the president to abolish previously awarded amnesties (the decision received considerable criticism). This constitutional decision was subsequently put in practice when the seized Bratislava courts stopped the criminal prosecution of the intelligence service officers allegedly involved in the abduction.

What is clear about this complex saga is that raises too many interesting legal questions to cover in the space of a blog post, but many of them have been debated at length in the Slovak juristic circles. In addition to the fundamental issue of ‘correcting’ seemingly unjust positive laws with natural-law interventions, there are questions regarding the acceptability of encroachment on legal certainty and the legitimate expectations of the beneficiaries of the amnesties resulting from their potential annulment; retroactivity of any measures to be taken; the appropriateness of annulling the amnesties by a constitutional act of the Parliament; and the form the constitutional law should take, to name a few.

I will therefore arbitrarily limit the blog to a more general discussion about the applicability of the Radbruch

Formula, at which I will look through legal-textual lens and by way of historical comparison.

The boundaries of the Radbruch Formula(s)

Prior to the vote of the Parliament, a group of prominent Slovak lawyers, judges and academics publicly supported the annulment of the amnesties through legislative action. Their legal argumentation has inter alia referred to the well-known Radbruch Formula, in as far as it prescribes that where a "discrepancy between the positive law and justice is so unbearable", "the statute, as 'erroneous law', has to make way for justice".

One of the signatories of the public declaration, Supreme Court judge Dušan Čimo, was asked in an interview the million-dollar question: how can one determine what level of injustice qualifies as 'unbearable'? He answered that "there is a majority agreement that the amnesties allowed the perpetrators to evade criminal prosecution for serious crimes which are even considered acts of state terrorism". He added that legitimate expectations of the victims should not be set aside in favour of illegitimate expectations of the perpetrators.

I think judge Čimo's answer somewhat understandably circumvents the question of 'unbearableness', and therefore of the applicability of the Formula, but, before proposing a different reading of the Radbruch Formula, it needs to be first unpacked itself.

As Brian Bix correctly observes, the Formula of Gustav Radbruch, as it originally appeared in an essay in 1946, actually comprises two different versions:

> *(1) Der Konflikt zwischen der Gerechtigkeit und der Rechtssicherheit dürfte dahin zu lösen sein, daß das positive, durch Satzung und Macht gesicherte Recht auch dann den Vorrang hat, wenn es inhaltlich ungerecht und unzweckmäßig ist, es sei denn, daß der Widerspruch des positiven Gesetzes zur Gerechtigkeit ein so unerträgliches Maß erreicht, daß das Gesetz als „unrichtiges Recht" der Gerechtigkeit zu weichen hat.*
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> *(2) Wo Gerechtigkeit nicht einmal erstrebt wird, wo die Gleichheit, die den Kern der Gerechtigkeit ausmacht, bei der Setzung positiven Rechts bewußt verleugnet wurde, da ist das Gesetz nicht etwa nur „unrichtiges" Recht, vielmehr entbehrt es überhaupt der Rechtsnatur. Denn man kann Recht, auch positives Recht, gar nicht anders definieren denn als eine Ordnung und Satzung, die ihrem Sinn nach bestimmt ist, der Gerechtigkeit zu dienen.*

Although the supporters of the constitutional amendment only refer to the first elaboration of the Formula, the second version might be of relevance as well. Particularly interesting in the context of the case could be the question whether Mečiar's amnesties, especially as they represented a bar on criminal proceedings against abductors, strove (erstreben) at all for justice. Arguably, the issuance of the amnesties, on the contrary, intended to create a situation of injustice and inequality before law by exempting individuals suspected of serious crimes from the criminal justice system. In fact, it could be further reasoned that any a priori suspension of the functioning of the criminal procedure should only be acceptable in the most exceptional of circumstances and firmly rooted in moral justification due to criminal law being the sole mechanism for establishing guilt and innocence in a legal system. With Mečiar's amnesties, there was no attempt at moral justification, in the law or outside of it.

The issue with the second version of the Radbruch Formula is the statement that such law (that does not even strive for justice) is not only 'erroneous law' but indeed no law at all. In the present case, however, it the Slovak Constitutional Court and the Bratislava courts which dismissed the prosecution validated the legal status of the amnesties. It is now difficult to make the claim that the amnesties are not, as a result of their profound immorality, of legal nature when, in the jargon of HLA Hart, the statute has been authenticated through the internal point of view of judges.

The judicial validation of the amnesties is problematic also from the perspective of the first elaboration of the

Formula. In the well-known examples of the application of the Formula, it was courts that refused to effectuate unjust Nazi and GDR statutes. Given that courts are ordinarily charged with the interpretation of open-ended legal texts, it would appear logical that the impossible task of establishing the existence of an unbearably unjust law should ideally fall to them. Dworkin's Hercules would surely be needed though.

The role of courts has also a practical dimension: as the Radbruch Formula does not by any means intend to dislodge the entirety of the positive law system, which is obvious from its first version, judges are in the best position to ensure an elementary content of justice (natural law) in the least intrusive way for the system as a whole (inter partes as opposed to erga omnes). The Slovak judiciary has probably irrevocably squandered the opportunity to take advantage of this position.

As a matter of historical comparison with the German experience, two more questions are outstanding. First, regarding where to draw the line on 'unbearableness', it would be contentious to say that the abduction, as the more vicious of the two pardoned events, is on the same level as the racial laws of the Nazi regime or the state-sanctioned, systematic and extrajudicial killing of border-crossers in the GDR. Although not explicitly mentioned by the Formula, it is opportune to ask whether the general applicability of the statutes in question in both Nazi Germany and the GDR, as opposed to the targeted effect of the amnesties, does or should exert influence over whether the disputed law is unjust to an 'unbearable' (unerträglich) degree.

The second issue, seemingly more minor, is that of regime transition. The Radbruch Formula had been invoked in situations where the morality of a new regime could not tolerate – or at least not apply – the unjust laws of the previous era. For all the authoritarian leaning and criminal association of the Mečiar government, and without taking anything away from the importance of the 1999 electoral success of Dzurinda and co., the dividing line between the new and old regime (and morality) is not as sharp as in Germany of 1946 and 1990. As for law, continuity of the legal system has been undoubtedly preserved.

What is the bottom line? We know the Radbruch Formula must be reserved for exceptional circumstances but the German experiences would prove too high a threshold to clear in the case of Mečiar's amnesties on account of both differences in degree of 'unbearableness' and wider context.

Nevertheless, I think the Formula can still be productively relied upon in the Slovak case when read inclusively with the second elaboration that emphasises the necessity of striving for justice, while excluding the assertion that the unjust law is not in fact law, as a result of the validating decisions of the Slovak courts. Born out of necessity, this might not be the neatest line of argument. But that is also in keeping with the Radbruch Formula.

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